

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review --) MM Docket No. 98-43
Streamlining of Mass Media)
Applications, Rules and Processes)

To: The Commission

PETITION FOR RECONSIDERATION OF KNOX BROADCASTING GROUP, INC.

Knox Broadcasting Group, Inc. ("Knox"), by counsel and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission for reconsideration of its *Memorandum Opinion and Order* ("Streamlining MO&O") on reconsideration of its *Report and Order*¹ in the above-referenced proceeding ("Streamlining Order").² Knox requests that the Commission extend relief to permittees, such as Knox, who had permits canceled prior to the effective date of the new rules, where such cancellation still has not yet become final.

Introduction

On November 25, 1998, the Commission released its *Streamlining Order* which created a uniform three-year term for all construction permits and automatically extended construction periods in their initial periods or with an extension request pending to three years from the date of an initial

¹ 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes, *Report and Order*, 13 FCC Rcd 23056 (1998).

² The *Streamlining MO&O* was published in the Federal Register on October 22, 1999. Consequently, pursuant to 47 C.F.R. §1.429(i), this petition is timely filed.

grant.³ The Commission also significantly narrowed the tolling procedures for construction deadlines and eliminated its practice of providing additional time for construction after a permit has been modified or assigned.⁴ Knox joined in the filing of a Petition for Reconsideration on January 19, 1999 requesting, inter alia, that (1) the Commission apply the new rules only to existing permits within their initial construction period, and grandfather, under the former processing policies, existing permits beyond the initial construction period; and (2) the Commission revise the new tolling provisions to provide relief in situations, such as Knox's, where the permit was already more than three years old before it was even acquired, and was thus rendered worthless by the new rules. In Knox's case, it acquired the permit, pursuant to FCC approval, from a party which held the permit for over three years, then was given only a year from the date it acquired the permit until the permit expired. The Commission denied Knox's request for extension of the permit after three years of consideration, during which time Knox actually constructed and was operating the station pursuant to an STA issued to allow testing of a special antenna system. An appeal of the denial of the extension was pending at the Commission at the time the new rules went into effect.

On October 6, 1999, the Commission released its *Streamlining MO&O*, which, based on the Petitions for Reconsideration that were filed, modified the rules in the *Streamlining Order* by agreeing to extend, by one year, the life of construction permits which either had not expired or had expired but had timely requests for extensions on file on the effective date of the new rules. However, the Commission did not specifically extend such relief to permits, such as that held by

³ See *Streamlining Order* at ¶83 and ¶89.

⁴ See *Streamlining Order* at ¶84.

Knox for Station WJRZ(AM), Toms River, New Jersey, which had been canceled prior to the effective date of the new rules, but which had appeals of the cancellation pending at that time. The *Streamlining MO&O* did, however, invite requests for waiver of the construction permit extension rules for situations which are not specifically addressed by the new Rules.⁵ Knox intends to file such a waiver request.

In its waiver request, Knox will argue that the peculiar facts and circumstances surrounding its construction permit warrant additional time to construct WJRZ(AM). In light of its current conclusion that a three-year period is an appropriate one in which to construct a new station, the Commission should allow Knox an additional year and a half to construct the station.⁶ However, Knox also believes that blanket relief to all similarly structured parties is appropriate. The Commission's decision to limit its blanket extension only to certain pending requests for extension is arbitrary and capricious.

Discussion

In the *Streamlining MO&O*, the Commission gave an additional year for construction to all existing permittees, including those with expired permits and unresolved extension requests. The Commission acknowledged that permittees may have invested significant time and money constructing facilities under the old rules would be in imminent danger of losing their permits. Therefore, to give these permittees a final opportunity to bring service to the public, the Commission

⁵ See *Streamlining MO&O* at ¶42.

⁶ The assignment of WJRZ(AM) to Knox was consummated on April 15, 1991, and the modified construction permit for WJRZ(AM) expired on June 10, 1992. Knox's request for extension of the construction permit was denied; however, an appeal of that decision remains pending before the United States Court of Appeals for the D.C. Circuit.

provided this relief to “permittees holding valid authorizations or extensions on February 16, 1999, the effective date of the Streamlining Order, including permittees whose authorizations have already expired but for which forfeiture is not final.”⁷ The Commission extended the construction permit deadlines for this exclusive group of permittees until one year from the effective date of the *Streamlining MO&O*, or until the existing permit expiration date, whichever is later.⁸ Permittees in Knox’s situation, among others who had petitioned the Commission for relief, were excluded from this select group for no apparent reason. In fact, the Commission failed to provide any explanation for choosing this one group of permittees over the others.⁹ Consequently, the Commission’s decision to provide relief to certain permittees, while excluding others, is arbitrary and capricious, in violation of the Administrative Procedure Act (“APA”).

The APA requires that agency action not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “An agency acts arbitrarily and capriciously if it ‘entirely failed to consider an important aspect of the problem’ or ‘offered an explanation that runs counter to the evidence before the agency.’” *California v. FCC*, 75 F.3d 1350, 1358 (9th Cir.), *cert. denied*, 116 S. Ct. 1841 (1996), *citing Motor Vehicles Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 US 29, 43-44 (1983). In other words, an agency must “offer a reasoned explanation that is supported by the record.” *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C.

⁷ *Streamlining MO&O* at ¶ 29.

⁸ *Id.* Knox’s Petition for Reconsideration was filed with a number of other parties, including Z Spanish Media Corporation. At footnote 36 of the *Streamlining MO&O*, the Commission states that its action moots the Z Spanish petition. As set forth above, that conclusion is incorrect.

⁹ *See Streamlining MO&O* at ¶ 29.

Cir. 1992). “A rule that upsets expectations . . . may be sustained ‘if it is reasonable,’ i.e., if it is not ‘arbitrary’ or ‘capricious.’” *DirecTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (citations omitted).

In this case, the Commission has not provided a reasoned explanation supported by the record of the proceeding for its decision to expand relief to only permittees who held valid initial authorizations or extensions on February 16, 1999 or had a permit that had expired but the expiration was unresolved and not a final order. No other permittees who had expended considerable time and expenses were granted relief, and the Commission, in its brief description of the group it considered entitled to relief at Paragraph 29 of the *Streamlining MO&O*, did not give any reason for setting this one group of permittees apart from the others. The reasons it gave for providing relief apply to many other groups of permittees with unique circumstances surrounding their failure to meet construction deadlines, including Knox. Knox, along with other permittees, invested significant time and money into the construction of facilities with the goal of providing service to the public. In addition, Knox and many others were faced with the uncertainty of the outcome of their permits under the new rules. No reasons that applied only to the favored group were given. The Commission failed to justify or explain its decision for including only permittees that held valid authorizations or extensions, or whose forfeiture was not final as of February 16, 1999.¹⁰ Consequently, the Commission’s decision is arbitrary and capricious, and constitutes a violation of the APA.

Moreover, as a practical matter, the provision of this one year grace period will conserve the

¹⁰ Knox’s appeal of the cancellation of its permit also was not final on February 16, 1999, and currently remains pending before the Court of Appeals. The proceeding before the court has been stayed pending Commission resolution of this Petition and Knox’s waiver request.

Commission's resources, by avoiding the need to consider each of the cases in a procedural posture similar to that of Knox, and to evaluate their merits under the waiver criteria. As the Commission has now acknowledged that three years is a reasonable period in which to construct a station, it will have to justify its denial of extensions to permittees such as Knox who had only a year to construct their facilities. Moreover, many of the permittees in situations similar to Knox have expended considerable resources and, by the very pendency of their appeals, have demonstrated a desire to serve the public interest. Giving them such an opportunity would be fully justified in light of the new rules adopted by the Commission.


Conclusion

For the reasons discussed above, Knox respectfully requests that the Commission reconsider its decision and include Knox, and other permittees in similar situations, in the group of permittees entitled to the special relief set out in its *Streamlining MO&O*. In the interest of fairness, Knox should be allowed an additional year and a half to construct WJRZ(AM).

Respectfully submitted,

KNOX BROADCASTING GROUP, INC.

By: _____



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CERTIFICATE OF SERVICE

I, Karleen Lamie, a secretary of Fisher Wayland Cooper Leader & Zaragoza, L.L.P.,
certify that I have on this 22nd day of November, 1999, caused a copy of the foregoing Petition
for Reconsideration to be served by first class U.S. mail, postage prepaid, to the following:

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